

IN THE SUPREME COURT OF MISSOURI

STATE EX REL RAYMOND SKIRVIN,)

Respondent,)

vs.)

Case No. SC93092

**CLINT ZWEIFEL,)
MISSOURI STATE TREASURER,)
et al.,)**

Appellants.)

**Appeal from the Circuit Court of Cole County, Missouri
The Honorable Patricia Joyce, Judge**

APPELLANTS' SUBSTITUTE REPLY BRIEF

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TABLE OF AUTHORITIES

CASES

State ex rel. Sturdivant Bank v. Little River Drainage District,

68 S.W.2d 671 (Mo. banc 1934)1

State ex rel. Drainage District No. 8 of Pemiscot County v. Duncan,

68 S.W.2d 679 (Mo. banc 1934)1

STATUTES

Mo. Const., Art. IV Sec. 282

OTHER

55 C.J.S. Mandamus Sec. 2002

ARGUMENT

Relator Raymond Skirvin argues in his Respondent's brief that the dearth of monies in the SIF does not mean it is subject to any insolvency test because the SIF is not a legal entity but merely the alter ego of the State of Missouri. Thus, he urges that the SIF can never be insolvent because it can be replenished at any time from the general state treasury. There are two fallacies with this argument. One is that neither the Treasurer nor the Director of Workers Compensation has the constitutional power to either levy a tax or to direct how already collected revenues are to be used. Secondly, this argument assumes that the liability covered by the SIF was **ever** a liability of the State of Missouri. In the absence of a second injury fund, liability for the injury now covered would be a liability of the current primary employer or no one at all.

The SIF is merely a mechanism for spreading the risk of prior disabilities of employees to all Missouri employers. Even the costs of maintaining the fund, administering it on a day to day basis and defending it in litigation, to the Treasurer's office making payments are all reimbursed to the State by the employers of Missouri through various surcharges. Payment of fund benefits and the costs of running the fund have never been the obligation of Missouri general revenue.

Relator mistakenly characterizes the drainage districts in *Sturdivant and Duncan* as lacking the ability to replenish funds to pay their financial liabilities

(Respondent's Brief p. 10-11). In one, the district had reached its maximum tax limit (as a school district might with a levy) and in the other, its maximum taxing limit would permit some payment but not immediately for every debtor. Nor does the court below have the power to order the Treasurer to pay SIF awards from general revenues. Art. IV Section 28, Missouri Constitution of 1945 prohibits withdrawal of monies from the state treasury without an appropriation for that purpose.

Although many cases have discussed the use of mandamus to force public entities to pay their debts, the Appellant has been unable to find a single case in Missouri applying that remedy in a manner that would require either the State Treasurer to pay money from the general fund that had not been appropriated or directing the General Assembly to make an appropriation for a specific purpose. Here the legislature has made an appropriation (an "E") for benefits to be paid from the SIF. The legislature has made no appropriation authorizing the payment of those benefits from the general revenue. Thus, it was stated in 55 C.J.S. Mandamus sec. 200: "Mandamus will not lie to compel the issuance of a warrant or voucher in payment of a claim where it is not within the power or duty of the officer to so, and it is generally necessary that there be funds appropriated or available from which the claim may properly be paid, as otherwise there would be nothing on which the writ could operate." Here the Director does not have the authority to

certify a second injury claim for payment from the general revenue and the Treasurer has no power to make such a payment.

Finally, Relator argues that if the court agrees with the Treasurer's position he is denied a remedy or any recourse. That statement is incorrect for several reasons. First, the Treasurer has not refused to ever pay Relator's award and it will be eventually paid with interest. Secondly, Relator has been denied no common law remedy because there is none for the enhanced disability compensated by SIF. Relator is free to try to push as much of the liability as possible on the current employer and accident. If a present employer argues that that portion of the claim is the sole responsibility of the SIF, an employee could argue that the financial status of the fund deprives him of his remedy under the workers compensation statute for the current injury. But that is not the factual situation here nor has such relief ever been requested.

CONCLUSION

For these reasons, the Treasurer requests this court's order reversing the mandamus judgment herein.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH RULE 84.06

The undersigned hereby certifies that this brief complies with the limitations set forth in Rule 84.06(b) and contains 779 words as calculated pursuant to the requirements of Rule 84.06(b)(2).

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was filed electronically via Missouri CaseNet, and served, on April 5, 2013, to:

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